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Colorado General Assembly

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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

December 19, 2016

The Committee on Legal Services met on Monday, December 19, 2016, at 9:18 a.m. in HCR 0112. The following members were present:

Representative Foote, Chair
Representative Dore (present at 9:35 a.m.)
Representative Kagan
Senator Johnston
Senator Roberts
Senator Scott
Senator Steadman

Representative Foote called the meeting to order.

9:19 a.m. – Kip Kolkmeier, Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1 a – Rules of Division of Motor Vehicles, Department of Revenue, concerning motor vehicle emissions inspection program – Rule 2, emissions inspection, 1 CCR 204-1 (LLS Docket No. 160422; SOS Tracking No. 2016 00394).

Mr. Kolkmeier said I will be talking this morning about the Department of Revenue (DOR) Division of Motor Vehicles emissions program. These rules are intended to regulate the licensure of emission inspection facilities. The issue and the reason that we would suggest not extending Rules 1.0 through 12.0 is that the licensure provisions exceed the statutory authority of the agency. First I

should mention that there are a number of jurisdictional issues here that make it somewhat more complex. The DOR's obligation is to do licensure of vehicle emission inspection facilities. The Department of Health and Environment (CDPHE) does the environmental regulation and even the Department of Transportation has a role to play in the siting of some of these facilities. The issue with these particular rules is remote sensing devices (RSD). These are portable pieces of equipment that are located adjacent to a roadway with the goal of measuring emissions as vehicles drive by without stopping, as opposed to a fixed inspection facility. Under the statute there are five categories that the DOR is allowed to license as vehicle inspection facilities: inspection and readjustments stations, inspection only facilities, fleet inspection stations, motor vehicle dealer test facilities, and enhanced inspection centers. However, these rules when promulgated established different categories for licensure. The rules and I would note for you specifically Rule 3.1 also provides for five types of licensed facilities: inspection only facilities, fleet inspection stations, enhanced inspection centers, RSD sites, and RDS units. Those first three mirror what's in the statute, the last two do not. In addition, the DOR licenses the inspectors and in the statute it says they have the authority to license emission inspectors. However, in the rules, and I would point you to Rule 4.0, they provide for three categories of inspectors: inspection only, fleet, and remote sensing. All of these Rules in 1.0 through 12.0 are tied into the definitions I just made reference to – in Rule 3.1 the type of licensed facilities and in Rule 4.0 the inspection license inspectors. Those do not mirror what's in the statute and you see from looking at a number of the additional rules if RSDs and RSD sites are themselves inspection facilities it really is not possible for those to fit under the rest of the licensure guidelines. I would note for you on page 5 of the memo there's a series of rules that we reference where it really is not possible for these remote sensing devices, these portable pieces of equipment, to comply. I'll just highlight a couple. If they are licensed inspection facilities they must be able to accept mail at that location and that can't happen. They must be registered with the Secretary of State and there's no methodology to register a piece of equipment with the Secretary. They must post signs so that the public can view them and in fact these devices are meant for vehicles to pass without stopping. You can see the difficulty of implementing RSD sites and facilities if they're going to themselves be licensed entities. Why is this important? It's important because licensure is a higher level of regulation and it also provides additional protection for the licensee. Under our constitution and state law, if in fact these pieces of equipment and those locations are themselves licensed entities then they must be afforded that higher level of protection. Finally, I would say that there is case law that's very instructive on this point. The Colorado Supreme Court in *Prouty v. Heron*, 255 P.2d 755 (Colo. 1953) really dealt with this exact situation. In that case the State Engineer had promulgated rules that had to do with the licensure of engineers and established categories for licensing that were not in the statute,

things like civil engineer, mechanical engineer, and electrical engineer and what the Supreme Court held in that case was that the agency does not have authority to create categories of licensure different than the statute and indeed the General Assembly does not have the authority to delegate that sort of discretion to the agency. That is the reason that we would suggest you should not extend Rules 1.0 through 12.0 because the licensure for RSD and RSD sites exceeds the statutory authority that they have in Colorado law.

9:25 a.m. – Laurie Benallo, Operations Manager for the Emissions Program, Department of Revenue, testified before the Committee. Ms. Benallo said we don't contest the finding but I would ask the Committee to consider only expiring those rules that specifically reference remote sensing. We do intend to go ahead with further rulemaking to address the concerns and change those definitions but the majority of the rules are not dealing with RSD and we would appreciate not having to open the entire rule up for workshop and the process. If that's something that you'd consider we would ask that you do that.

Representative Foote said just a clarification, what we have in the memo here is that Rules 1.0 through 12.0 are the rules that should not be extended. Are you asking for something other than Rules 1.0 through 12.0? Ms. Benallo said we're asking for just the specific items, paragraph numbers, that reference RSD. There's a list of those in there and we were just going to ask that those specific items not be extended and give us the opportunity to do rulemaking to address the concern about the licensing.

Senator Steadman said when you say "there's a list in there" could you tell me what you're referring to? Ms. Benallo said I'd have to grab my notebook. Senator Steadman said that's okay, we can move on. Ms. Benallo said I'm sorry for not having this at my fingertips, but it would be Rules 3.6, 3.11, 5.2, 5.3, 5.5, and 5.6.

Representative Foote said are those all of the rules or are there other ones? Ms. Benallo said there's Rules 1.12, 3.1, 5.9, 5.11, 5.15, 5.16, 5.17, and 5.18 as well.

Senator Steadman said the list you're referring to is on pages 5 and 6 of our memo? Ms. Benallo said yes, it is.

Senator Roberts said I'm wondering if staff could respond as to why we didn't tailor it down.

Representative Foote said thank you Senator Roberts, I was thinking the same thing. Mr. Kolkmeier said obviously when we analyzed these rules we did look at what would be the least number of rules that could be objected to. The real

difficulty here is that the remote sensing provisions are put in the definitions sections, so if you removed Rule 3.1 for instance then none of the provisions that have to do with the use of the term inspection station make sense anymore. There wouldn't be a way to know what entities are licensed if the definitions sections are taken out. We would suggest that at the very least every provision that makes reference to remote sensing would have to be removed but once you do that then the rest of the provisions no longer follow. Representative Foote said just to be clear, that's where you get the Rules 1.0 through 12.0 in their entirety? Mr. Kolkmeier said regrettably yes. Representative Foote said and your position is that the definitions don't make any sense if we just go in, as is being suggested, to take out some of the rules. We just need to take out all of the rules if we were to go that route. Mr. Kolkmeier said right. This particular rulemaking recodified a provision that was already in statute and there are two other rules that we're not objecting to, but all of Rules 1.0 through 12.0 are interconnected in terms of the entities that are licensed and what licensees must do.

Representative Kagan said I'm just looking at the procedural aspects of this. It seems that your division told the Office that you weren't contesting the nonextension of these rules and it appears to me now you are contesting with respect to this particular subset of the rules. That troubles me a little. Have I misunderstood something here? Ms. Benallo said we are not contesting those. I was just asking because procedurally for us in-house to do rulemaking, which we will do in the interim, I didn't want to open the entire rule back up for discussion. But I can do that if that's what needs to happen.

Representative Foote said Ms. Benallo you heard staff talk about the fact that the rules are interconnected. I'd like to hear what your position is on that. Ms. Benallo said the way they are constructed there is difficulty if you take the definition out because what we were trying to do when we recodified this rule was simplify. It had so many requirements that were repeats of statute and repeats of what you find in the Air Quality Control Commission's Regulation 11. In the former rule we had a lot of overlap. It's really an oversight on our part to not have identified that licensing of our RSD sites and units was not included in the statute. It was in the former rule and there's nothing that I can say other than we didn't pay enough attention to that piece of it and so we ended up with a licensing requirement there. Representative Foote said okay, thank you.

9:33 a.m.

Hearing no further discussion or testimony, Senator Steadman moved to extend Rules 1.0 through 12.0 of Rule 2 of the Division of Motor Vehicles and asked for a no vote. He said I see the department's point that we're probably repealing

more than is necessary and yet I don't know a better way to figure it out for now. Maybe if next year the DOR can come in with something a little more precise the bill could be amended to pick and choose what really needs to be repealed. But I do see the interdependency, particularly in Rule 3.1, which has the remote sites embedded in it, but it also lists the other license types. I think once you take that out everything else kind of collapses in on itself so that's why I'm going with the staff recommendation. But I wanted to suggest that either way the DOR has got some work to do and they might be able to make their work a little easier if they make our job a little easier when this bill gets to Committee in January or February. Representative Kagan seconded the motion. The motion failed on a vote of 0-6 with Senator Johnston, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, and Representative Foote voting no. The rule was not extended.

9:35 a.m. – Esther van Mourik, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1 b – Rules of the Taxpayer Service Division, Department of Revenue, concerning mandatory electronic funds transfer, 1 CCR 201-4 (LLS Docket No. 160055; SOS Tracking No. 2015 00333).

Ms. van Mourik said I am here to talk to you about electronic funds transfers (EFT) of sales taxes and I'm also going to talk to you a little bit about EFT of income taxes just for comparison purposes. The rule at hand is regarding EFT of sales taxes. Colorado sales tax law requires vendors, which are also known as retailers, who have a total yearly state sales tax liability of more than $75,000 to remit all state and local sales taxes by EFT. The headnote of the statute even specifies it as mandatory. The rule repeats the statute, specifies how the EFT should be made, and provides a consequence if the vendor fails to use the EFT. These sections of the rule clearly fall within the statute's authority which is also embedded in the statute for the DOR to promulgate rules to effectively implement this section. The law says that you must transmit by EFT if you meet that threshold and then the law also tells the DOR to promulgate rules to effectively implement this section. In addition to the items that I've listed that the rule does, which is specifying how the EFT should be made and providing a consequence if the vendor fails to use EFT, it also includes a section that grants an exception to the requirement to remit via EFT in the case of undue hardship. This section of the rule conflicts with the statute because it creates an exception to the mandatory remittance method. In addition to the clear conflict with statute, this section of the rule also exceeds the grant of rule-making authority to effectively implement the law because implementing a mandatory law does not include allowing exceptions to it. I'm going to talk to you quickly now about a comparison. In section 39-22-604 (4), C.R.S., there's a similar but slightly different EFT requirement for the remittance of income taxes. That language is different in that it says the executive director may require a taxpayer who has an

annual estimated withheld tax liability of a certain number to remit withheld taxes by EFT. We've got a statutory section in the sales tax laws that says you *shall* remit via EFT but the income tax law on the other hand says you *may* require remittance via EFT. In the case of the income taxes there was a rule filed by the DOR that also included the same undue hardship waiver. We as the Office approved that rule because it fit within the notion that they *may* require EFT in the case of income taxes and so they may also allow an undue hardship waiver. However, in the sales tax statute, there is a very clear requirement that the taxpayer *shall* remit the sales taxes via EFT and so the grant of an undue hardship waiver in the rule grants an exception to the mandatory EFT requirement.

9:39 a.m. – Phillip Horwitz, Director, Office of Tax Policy Analysis, Department of Revenue, testified before the Committee. He said my office drafts and runs the promulgation process for our rules. As you noted, the DOR does contest the recommendation by the Office. Let me say at the outset that we recognize and understand the reasons why Ms. van Mourik has come forward with her recommendation, but we respectfully disagree. Let me first give you a little bit of background about why we promulgated this rule and the way that we did. We think that the rule has to be viewed in context and it's important to know that the sales tax EFT statute was passed in 2001. The 2001 date predates the issue that gave rise to our need to issue a hardship exemption. There are three other EFT provisions in the statutes. The first one is a withholding provision that Ms. van Mourik has already made reference to, section 39-22-604 (4)(a), C.R.S., and as she noted it indicates that the executive director may require any taxpayer to remit by EFT. There are also two other provisions in the statutes that are relevant to your consideration of the rule and that is the retail marijuana sales tax EFT provision found in section 39-28.8-202 (3), C.R.S., which again says the DOR may require taxpayers to file returns and remit payment electronically. And then the retail marijuana excise tax provision in section 39-28.8-304 (3), C.R.S., is essentially the same provision. Again, we recognize those three provisions say that the DOR may require and the sales tax provision says that a taxpayer must remit electronically but it is the marijuana businesses that gave rise to our recognition that there needs to be a hardship exemption. And I would just note that as a timing matter this rule was adopted at the same time we adopted the two marijuana rules as well as modified our withholding rule. The marijuana establishments, as many of you I'm sure are aware, have had trouble, in fact have found it impossible in some cases, to establish banking relationships. Certain marijuana businesses, in particular the retail stores, have found it impossible to establish banking relationships and a banking relationship is essential to creating an account that allows you to remit by EFT. This essentially means that it is effectively impossible for these businesses to comply with this provision of the statute. There are other

competing provisions of the statutes that they must comply with such as collection of the sales tax. If they make a sale of marijuana, in this case, or frankly anything that they sell that is subject to tax, they must collect sales tax. They also must remit that sales tax to the DOR and this provision if you read it as narrowly as is being suggested would not allow them a mechanism by which to remit that tax. That's why the statute must be read in the context of what is possible rather than demanding an impossibility. This statute, it should be noted, is a procedural statute and the statutes that we think it's competing with are substantive provisions and so we think as between the two a procedural statute should give way. And as I noted, if a taxpayer has collected sales tax as it's substantively required to do, it is required to remit the tax and the statutes must be read as allowing a mechanism by which that taxpayer can remit such collected taxes. I think our rule should be viewed as merely a necessary recognition that their failure to comply with the EFT provisions when it is not possible for them to comply is not in itself a violation.

Two other points that I would make and again as I said at the outset we recognize the reasons why Ms. van Mourik came to you with the recommendation that you disapprove the rule and in the abstract I think we would say that we recognize it's probably a better reading just in isolation, but we think that there is a reading that is consistent with the statute that allows the rule the flexibility that it has claimed. First of all, I would contrast it with the provision that Ms. van Mourik has already referred to and with the two marijuana provisions that say that they DOR may require EFT filing and the sales tax statute in question says that a taxpayer must remit by EFT. I concede that the more natural reading there is that every taxpayer must remit by EFT, but it's possible to read that statute in contrast with the may require statute as really saying that the DOR must require taxpayers to remit by EFT which is what our rule does. In other words, it's mandatory in the sense that the DOR doesn't have broad flexibility as to whether to require EFT or not require EFT. It must require EFT, but it shouldn't necessarily be read, especially in the context that I've given you, as requiring every single taxpayer to remit by EFT. That's one reading that I would suggest to you. The other thing I would point to is the provision in the sales tax statute that says the DOR may promulgate regulations to effectively implement the statute. Ms. van Mourik is focused on the term implement, but I would focus your attention on the term effectively. In the context that we've described where we have taxpayers that just cannot comply with the remittance requirement, we think that the term "effectively implement" gives us enough wiggle room to adopt the rule that we've adopted and would ask that you extend the rule. That's our defense of why we've done it and why we think we had to do it.

Senator Steadman said since this rule has been in place how many hardship exemptions has the DOR granted and can you tell us a little bit about the nature of the taxpayers to whom they were granted? Mr. Horwitz said I'm embarrassed to say I don't have that information at my fingertips. It didn't occur to me to have to know that. Senator Steadman said I know you can't discuss individual taxpayers with us, but have there been taxpayers other than marijuana businesses that have applied for the hardship exemption? Mr. Horwitz said I honestly don't know and I need to go back and check. I should have done this before this Committee meeting.

Representative Kagan said consistent with the effective implementation that you're trying to accomplish, couldn't we do it just with the statute this session that takes immediate effect upon signature of the Governor? Mr. Horwitz said I think that is absolutely right and we would ask that if you don't extend our rule that you consider just such a move. We think it's necessary. I think we read the statute, and you might consider that it's a strange reading, but we read the statute as allowing us that flexibility. But we think if this Committee disagrees we would ask that the legislature consider amending the statute to give us this flexibility.

Senator Steadman said I'm sympathetic to the policy situation and the problem you're trying to solve but I'm not sure if effectively implement is the right solution to the problem. I look at the other two statutes specific to marijuana taxes themselves and they were both written to make the EFT optional knowing that these businesses had these challenges. At the time we were creating the special marijuana sales and excise taxes we had the opinion from the Attorney General's office that medical and retail marijuana would be subject to our standard state sales tax and so at the time we were making accommodations around marijuana taxes we knew about that issue and didn't go back and make the accommodation for standard sales tax and that seems to be the mistake. It should be corrected and I think a bill in the next session is probably the better way to go about it than the interpretation you're seeking from the Committee this morning.

Senator Johnston said I have a question for Ms. van Mourik. On the other side of this argument, there's no explicit prohibition in the statute of a hardship exemption. Tell us why in your mind without that prohibition the language proposed in the rule can't fall under the language in the statute that directs the DOR to promulgate rules to effectively implement this section. Ms. van Mourik said I think it falls on the *shall* versus *may* distinction. In the case of the sales tax statute it specifies that the taxpayer *shall* remit via EFT and that doesn't leave a lot of wiggle room with respect to the rule promulgation to allow for an exception to that shall remit via EFT requirement. I appreciate Mr. Horwitz's

explanation of the DOR's position on this, however, I think indicating that the sales tax statutes for marijuana sales tax collection allowed for that wiggle room, and exactly as Senator Steadman pointed out, that didn't get reflected in the general sales tax collection statutory section. The way we interpret our statutes, there was a reason why we didn't make that change, so reading the fact that the other statutes allow for that wiggle room, that doesn't seem to change the law which says you shall remit via EFT. Furthermore, the argument that this is particularly related to the marijuana statutes is not reflected in the rule. The undue hardship waiver that's granted in the rule applies to all sales tax remittances, not just for marijuana businesses. That makes it even for me indicative that the right decision for the Committee would be to not extend Rule 39-26-105.5 (4). Mr. Horwitz said I find myself in the unenviable position of arguing with the Office which is not a position we ever want to be in and is not generally one we seek. In a sense responding to Senator Steadman, I mean no disrespect in responding, but I would like to just address the two issues that Ms. van Mourik and Senator Steadman just raised. With respect to the broad nature of the exception it's true of course that the rule does not refer only to marijuana businesses but that is in part because we want to think ahead to other situations that we may not have in mind at the moment and so we did write it more broadly than just addressed to marijuana businesses because we think it's possible that other businesses might find themselves in the same position. And with respect to the point that Senator Steadman and Ms. van Mourik made about not changing the sales tax provision, I certainly can't argue that that isn't a reasonable reading of the events but I would also point out that it's at least possible to read that action as a recognition that the language about effectively implement also already gave the DOR that flexibility so it wasn't necessary. I do think that you can always read silence by the legislature either way and so it's very difficult to say one way or the other that it should be read as necessarily foreclosing a hardship exemption. I certainly am not going to argue that it should be read as authorizing that exception, but I don't think it should be read one way or the other.

Representative Kagan said if we were to choose to not extend the rule and seek passage of a statutory amendment to statutorily implement this hardship exemption, would you think that it would be good to specify what qualifies as hardship, because in the hardship exemption that you've currently got in the rule you say not trusting the banking system is not a basis for claiming this exemption, you only say what is not a basis for claiming it. I'm thinking maybe the statutory amendment if we don't extend the rule the language should say it's a hardship because of the inability of the business to obtain banking or the inability of the taxpayer to obtain banking. Would that be a better way to do it than to simply say mistrust of the banking system is not an adequate ground for hardship, but inability to obtain banking is basis on which you can claim a

hardship exemption? Mr. Horwitz said I wouldn't necessarily want to say one way or the other. I think that's really a policy issue. The only thing I would be cautious of is the consistency among the various statutes. My initial thought is if you were going to change the statute, make it look like the other ones and say the agency may require EFT. If you do anything more specific in one statute but don't do that in the other statutes I think that leaves a question as to why those two are different. Ms. van Mourik said I would completely agree with that and I agree with Senator Steadman. It's not that I don't understand where the DOR is coming from but I just read the statute very literally. With respect to that I think Mr. Horwitz is absolutely right that if a legislative solution is sought to fix this issue I agree that all four statutes should read the same and that it really should just be that they may require EFT. The DOR has broad rule-making authority and I think as evidenced by the fact that I approved the undue hardship waiver for the income tax remittance requirement I would approve it if it were to show up on my desk if that were changed from a shall to a may.

Representative Foote said Mr. Horwitz, I am going to re-explain just briefly one point of your argument and I'll tell you where I'm coming from when I ask this question. Really I think the discussion has been along the lines that we have a conflict between shall and may. One means one thing, one means another thing. One part of your argument was that they could be read in harmony under certain circumstances, the effectively implement clause would be one, so I understand you're argument there. But then you had another argument which was something about how every single taxpayer doesn't have to remit through EFT and that was a way that we could harmonize shall and may in your opinion. You kind of lost me there and I was wondering if you could re-explain that. Mr. Horwitz said certainly. My focus there was not so much on the language in section 39-26-105.5, C.R.S., as an initial focus on the contrasting language, for example, in the withholding statute in section 39-22-604 (4)(a), C.R.S., and that statute says the director may require any taxpayer to remit by EFT. It's speaking in terms of the agency's determination that it's either going to require EFT or not going to require EFT, but it's not really speaking to each individual taxpayer, it's just saying the DOR may, as a general matter, require EFT remittance and then how that applies at the individual taxpayer level is essentially left to the DOR's rulemaking. I'm suggesting that you could read section 39-26-105.5, C.R.S., as a contrast to that allowance. As I think I said when I made the argument, it's a somewhat strained reading of the language in that section. You only get there by contrasting it with the withholding provision. But the language in that section says any vendor whose liability for state sales tax only for the previous calendar year was more than $75,000 shall use EFT. As I said when I introduced the argument, Ms. van Mourik's point is well taken. The more natural reading here is to say that it refers to every taxpayer, but I think it can be read in contrast to the withholding provision as essentially taking

away the DOR's flexibility or whether they're allowed to either require EFT as a mandatory matter or not require EFT at kind of the agency level where we have the option to require EFT or not require EFT for withholding taxpayers. You could read this as saying we don't have the option, we must require EFT of sales tax taxpayers. When you put that together with the effectively implement language I think the argument is that that gives us enough flexibility to say that the shall in this case is really referring to the DOR and not each individual taxpayer. But we conceded that that language doesn't perfectly track with the language as used in the statute. You really have to stretch that effectively implement to cover that, but as we've noted we think that there's only one way to effectively implement the provisions of the statute and that's by allowing the hardship waiver. But we recognize where Ms. van Mourik is coming from and if this Committee decides to not extend the rule we understand why.

10:00 a.m.

Hearing no further discussion or testimony, Senator Roberts moved to extend Rule 39-26-105.5 (4) of the Taxpayer Service Division and asked for a no vote. Senator Steadman seconded the motion. Senator Johnston said it sounds like there's some general agreement that this flexibility may be needed for the reasonable administration of the tax laws in the state and also that there's reason to read the shalls as shalls, and for those of us who put shalls in statute we know how hard they are to get in and we hope that they matter. My question is a practical one which is do we know what the implications would be for taxpayers in the state in the gap between when this rule sunsets and when legislature is able to pass modifications over the next six months. Is it not for the next year that this would sunset? What would the tax filings look like for this year?

10:03 a.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, testified before the Committee. She said there should be no gap with this rule because the rule is in place and is in effect until May 15, 2017. What the DOR needs to do is change the rule or get statutory authority before the Rule Review Bill passes and before that May 15 deadline. It can be handled without there being a gap.

Senator Johnston said so as long as Senator Kagan files this as one of his first three bills we should be fine.

Senator Kagan said my concern is I that we could reach a situation where if the legislature were to fail to act for any reason then I don't see how we could collect the taxes from those businesses that don't have banking. It seems to me that the prudent course would be to extend the rule and implement a change in

statute and then once we implement change in statute all is well, but if for some reason we fail to implement the change in statute at least we have the rule that is allowing the tax to be paid in cash.

Senator Steadman said I would not go along with that course of action just because I think the Committee has its role in the rule review process for a reason, it catches little technical things like this that require us to do a couple things to get everything back in line. Not extending the rule today and having this in the bill when it's introduced to expire does not set in motion a crisis. If we fail to pass anything that would change the statute and this rule goes away, the businesses are still up against an impossibility. They're still parking an armored car in front of the annex building across the street and taking cash in to make some of their tax payments and just because the rule is going to say everyone shall remit electronically doesn't mean these folks are going to be remitting electronically. They're just going to have a choice between violating the electronic remittance rule and not paying their taxes and I'm sure the businesses would choose to pay their taxes and so they'll continue to just roll up in armored cars full of cash. I think this can all be fixed, but I think the right thing to do is for us to vote on the motion to extend the rule and to encourage legislation in the next session. I would hope that that legislation would maybe be specific to marijuana businesses because of this banking issue that our state has been worrying about for several years now and getting absolutely zero action out of our federal level. Another reason to put the rule in the Rule Review Bill for expiration.

Senator Roberts said I'm going to echo what Senator Steadman just said. This is a compelling case on the facts if that's what the role of this Committee was, but it's a terrible precedent to start blurring the line between shall and may and if you start here when do you stop? I think it is correctable. I would imagine that you could accomplish that on a bipartisan basis because it is a true quandary. I don't think we want to start going down the road of thinking of the policy so much as what the role of this Committee is and whether an executive agency or entity can exceed the scope of statutory authority which again is really what we're here to do. I would again urge a no vote.

Representative Kagan said I take the point of Senators Steadman and Roberts but I would just note that it is a reasonable though somewhat strained reading of the statute to suggest that the shall is a requirement with a regard to the DOR and not with regard to the individual taxpayers. Therefore if the DOR has a requirement and a waiver process it is arguably within the statute and with regard to the effective implementation requirement, in the other contexts we say things are allowed to make things effective. It is a strained, but plausible reading of the existing statute and in that case I would argue that perhaps it doesn't

violate the principle that we're making policy rather than interpreting the statutory authority of the DOR because it is a possible reading of the statute as it exists. But it's not an ideal reading and that's why I'm suggesting that we allow this strained reading to be the current practice but we improve it by also running a bill. I don't think it violates the principle that we should not be making policy and we should only be determining whether a rule follows the authority. Ms. van Mourik said I have a little worry in my mind that if you allow the rule to stand as it is and then seek legislation there's no motivation for the DOR to work very hard to make sure that the legislation passes. And you've still got the issue that you have a law that says shall and a rule that makes it a requirement unless you've got an undue hardship waiver.

Senator Roberts said I would give Mr. Horwitz creativity points for sure, but I find it strained to the point of feeling like a pretzel to get there so my suggestion would be that we let it go and assume the legislature will respond to the significant need.

Senator Johnston said I just agree with Senator Roberts. I commend Mr. Horwitz and team on trying to find a way to solve a real practical problem in front of them and trying to find a way to make sure folks pay their taxes in reasonable and efficient ways. My general bent towards pragmatism would lead me towards Representative Kagan which is can't we find a way to make this works as it is. But I do think when I consider all the rest of the state statutes we have where you could softly turn a shall to may, I think I can name six or seven instances of that which any member of this Committee would be terrified at the prospect of a bill that you had a shall in, whether they were mental regulation or assessment requirements or clean air requirements, and then there was an exemption created out of that in regulation that wasn't created in statute. I think there would be concerns. I think this is a real problem that Mr. Horwitz and his team have identified and I think it should be fixed by the legislature. I have faith that given the strength of the leadership on this Committee and the support of the marijuana lobby you'll probably be able to get this passed. I would say this can be resolved and I think I'm with Ms. van Mourik today.

Hearing no further discussion, the motion failed on a vote of 0-7 with Representative Dore, Senator Johnston, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, and Representative Foote voting no. The rule was not extended.

10:11 a.m. – Michael Dohr, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1 c – Rules of the Marijuana Enforcement Division, Department of Revenue, concerning medical marijuana

and retail marijuana, 1 CCR 212-1 and 1 CCR 212-2 (LLS Docket No. 160427 and 160428; SOS Tracking No. 2016 00342 and 2016-00343).

Mr. Dohr said I have two separate issues for you. The first issue relates solely to the medical marijuana rules, specifically dealing with the definition of "medical marijuana business operator" in Rule M 103 and then Rules M 1700 through M 1704 which create a registration or licensing scheme for medical marijuana business operators. Before I get to the analysis there needs to be a little bit of history from last session. Last session the General Assembly adopted H.B. 16-1261 which was the retail marijuana sunset bill and in the retail marijuana sunset bill it included a license for retail marijuana business operators. Because it was the retail sunset bill, the sunset report did not recommend a corresponding license for medical marijuana business operators and also during last session the General Assembly did not consider any bill for medical marijuana business operators and that fact will become important once we get to the analysis section. That led the Marijuana Enforcement Division (MED) to create medical marijuana business license operators through rules. However, there's no statutory authority for that classification of licensure or registration. The authority for retail marijuana business operators obviously only applies to the retail marijuana code not the medical marijuana code so that does not suffice. Now in the medical marijuana code there are specific statutes related to licenses. At the bottom of page 2 of your memo it shows that the MED does have the authority to develop licenses and at the top of page 3 in their rule-making authority it shows that they do have the authority to address such matters that are necessary for the fair, impartial, stringent, and comprehensive administration of the article. But again that authority needs to be read in conjunction with the authority to develop licenses. Their broad rule-making authority does not allow them to actually go beyond the statutory authority to just develop licenses. That authority to develop licenses is just limited to providing the details that go along with licenses, not creating new licenses. That authority is not sufficient. They also have authority in section 12-43.3-401 (1)(d), C.R.S., to issue and grant occupational licenses and registrations for operators but that authority is also insufficient. First of all, that authority relates to occupational licenses and registrations and the medical marijuana business operators are business licenses. Specifically the rules for medical marijuana business operators require that they maintain and designate a separate place of business from the stores or the cultivation facilities or manufacturers that they're actually operating. That is a business license not an occupational license. An occupational license generally goes to the individuals, the owners, managers, employees, contractors, or those folks. Second, the authority for the retail marijuana business operators is found in the retail marijuana code in the corresponding section 12-43.4-401, C.R.S., and you can see on page 4 of the memo if you compare and contrast that authority is not found in the medical

marijuana code authority, so they are then relying on two different authorities for the rules. Finally, that authority in that section only extends to issuing or granting licenses; it does not extend to creating licenses. The authority in that section is also insufficient. In addition to these questions of the statutory interpretation there's also case law related to licensing. You heard Mr. Kolkmeier from my Office earlier talk about the *Prouty* decision where the Colorado Supreme Court said that the executive branch does not have the authority to create licensure classifications through rule and that the licensing authority is specifically limited to the bounds and limitations of the particular statutes. Again that's the way this has always worked with marijuana licensing up until this point. All of the licenses that they have done and have rule-making authority for have been the licenses that have been created by the General Assembly. Finally, I think the other issue that the Committee needs to be aware of and that I sort of mentioned before is that the General Assembly last session had an opportunity to create medical marijuana business operator licenses and they did not. In the retail marijuana sunset bill, H.B. 16-1261, there also was a recommendation for retail marijuana business transporters. Obviously that then had the same issue where there would only be a license on the retail side and not the medical side so the General Assembly adopted H.B. 16-1211 which created licenses for both retail and medical marijuana transporters. This issue was out there last session and the General Assembly could have chosen to provide licenses on both sides for medical and retail marijuana business operators and the General Assembly did not. Therefore we believe that the definition of "medical marijuana business operator" in Rule M 103 and Rules M 1700 through M 1704 should not be extended.

Representative Kagan said if I were to obtain under the current rules a medical marijuana business operator's license what am I licensed to do as a result of having that license? Mr. Dohr said the operators are basically going in and running the operations for these businesses, so you may have people who wanted to have a medical or retail marijuana business but didn't necessarily have the expertise in being able to run those businesses and so they would be hiring people that actually have that expertise to do that.

Mr. Dohr said the second issue deals with the definition of "direct beneficial interest owner" which is found in Rules M 103 and R 103. This issue relates to both the medical marijuana code and the retail marijuana code. Last session the General Assembly adopted S.B. 16-040 which really changed the requirements related to ownership of marijuana businesses on both sides of the industry. Primarily the intent of the legislation was to allow more ownership and ownership from outside the state of Colorado. Among other things the legislation created the concept of a direct beneficial interest owner. There is a statutory definition of that which you can find on the bottom of page 6 of your

memo. Basically, the definition is the same for both medical and retail marijuana so I'm just going to read the medical definition, "direct beneficial interest owner means a person or closely held business entity that owns a share or shares of stock in a licensed medical marijuana business including the officers, directors, managing members, or partners of the licensed medical marijuana business or closely held business entity or a qualified passive investor". The rules also include a definition for direct beneficial interest owner and you can find those definitions on page 7 of your memo and they call for a "natural person or a closely held business entity" and then track the rest of the statutory language. The difference is that the statute calls for a person and the rules call for a natural person At first blush that may not seem like a significant difference but it is because in both the medical and retail codes there is actually a definition of person which you can find at the bottom of page 7 of your memo. It is defined as "a natural person, partnership, association, company, corporation, limited lability company, or organization or a manager, agent, owner, director, servant, officer, or employee thereof". If you apply the rules definition to the statutory definition of person you would ultimately be cutting out all of those legal business entities that are defined as person under the statute and therefore there is a conflict between the rules and the statute and we are asking that the definition of "direct beneficial interest owner" in Rules M 103 and R 103 not be extended.

10:23 a.m. – Ron Kammerzell, Senior Director of Enforcement, Marijuana Enforcement Division, Department of Revenue, and Claudia Brett-Goldin, First Assistant Attorney General, testified before the Committee. Mr. Kammerzell said in the interest of full disclosure I'm not an attorney and so I did ask our legal counsel Ms. Brett-Goldin to come to the table with me to provide any technical responses as necessary. First of all I wanted to thank Mr. Dohr for working through this with us and for his professionalism and the spirit of cooperation that he's exhibited with us in trying to work through these issues. I think at the end of the day we just have a professional disagreement on the legal analysis of this and nothing more. I think Mr. Horwitz earlier had the right comment from the perspective of the DOR. This is not a position we relish, to be before this Committee. We take our rule-making responsibilities very seriously. I just want to say that the General Assembly rightfully granted the state licensing authority broad rule-making authority to deal with a new and dynamic industry, that of the marijuana industry in Colorado. The state licensing authority has responsibly exercised that authority granted to it, consistent with legislative intent, in a manner intended to responsibly regulate the marijuana industry in Colorado and I think that applies to both issues before you here today. With that I'll just jump right in to the medical operator issue. There's a slide presentation handout here for your consideration. I'm not going to read through the entire thing. The medical marijuana rules allow businesses

to hire management companies to run their businesses and this new rule requires that a registration for a management company and occupational licenses for the employees who perform the related management services are required. I think it's important to note that for this presentation we've used interchangeably the concept of a registration and a license and to be clear, our intent with this regulation was to create a regulation and not a license. We recognize the authority of the General Assembly to create licenses in the statute and this is purely a registration. The rules that we have granted do parallel the retail marijuana business operator license that was created in the retail sunset bill last year and this is intentional so that we have some balance between the medical code and the retail code. There's really a good reason for that. Many of our businesses operate both medical and retail licenses and many of them are co-located and so the concept of a retail operator license was a great concept because it gave the ability for businesses that didn't wish to operate the business themselves to bring in a management company to operate their business for them. However, in the instance of those that are co-located it really was going to provide some hardship for the industry and that is that they could hire a management company to operate the retail side, but they couldn't hire them to operate the medical side of the business and when they're co-located that's a real problem for the industry. This regulation was really intended to allow the ability to register the operator on the medical side and allow the licensed retail operator to manage the medical side of the business. As we point out in our presentation we do believe that the state licensing authority through section 12-43.3-202, C.R.S, as well as 12-43.3-401, C.R.S., has broad rule-making authority to do what we've proposed in the regulation. Also the medical and retail marijuana codes allow these marijuana businesses to hire these management companies but it says "each licensee shall manage the licensed premises himself or herself or employ a separate and distinct manager on the premises" and that is in both section 12-43.3-310, C.R.S., of the medical code and section 12-43.4-309, C.R.S., of the retail code. Under the prior rules, prior to the passage of this, this was accomplished by treating a management company as a type of owner so if we had a management company that wanted to come in and operate the business really the only avenue that we had was to treat them like an owner which is a much more onerous process for the management company and the licensee. And for every single business location that they manage they would have to submit as an owner for that individual license. With an operator registration or license they are able to go in and submit their application to us once and they get approved and registered or licensed and are able to go to any business and as long as they have a management agreement in place that they provide to the MED they are able to do that for all of these businesses. It doesn't trigger a change of ownership for a single business that they wish to manage on behalf of the licensee. It's true that the retail sunset bill did create the new license type for the retail side. The

General Assembly reviewed the department of regulatory agencies' (DORA) sunset review and added a mandatory license there. But the medical marijuana code expressly authorizes the issuance of registrations and identifies operators as one type of registration, specifically in section 12-43.3-401 (1)(d), C.R.S., it says "for the purpose of regulating the cultivation, manufacture, distribution, and sale of medical marijuana the state licensing authority in its discretion upon application in the prescribed form made to it may issue and grant to the applicant a license from any of the following classes" and paragraph (d) states "occupational licenses and registrations for owners, managers, operators, employees, contractors, and other support staff employed by working in or having access to the restricted areas of the licensed premises as determined by the state licensing authority". In our opinion the medical code does not limit registrations to individuals. Section 12-43.3-401 (1)(d), C.R.S., authorizes licensing or registration of those that provide services to or work in marijuana businesses. Nothing in that section limits issuance of registrations to individuals and operator is one category of approved service provider under this subsection. The Office does not object to occupational licenses for management company employees who perform marijuana related management services. The Office appears to object only to a required registration for the business entity itself that employs those individuals. Business entity operator registration is consistent with the codes requirements for transparency and vetting of those involved with the marijuana business. The General Assembly didn't alter the medical marijuana registration when adopting the retail sunset and I think that's an important point to make. Prior to the retail code sunset review both the medical and retail codes permitted the state licensing authority to create business operator registrations. The sunset bill for retail marijuana reflects a legislative choice to create a mandatory license class rather than an optional registration. The transporter bill was an industry backed bill reflecting industry priorities regarding transporters and that is why it was introduced separately. The transporter bill does not reflect a legislative determination to preclude medical marijuana business operators as well and the General Assembly did not amend or repeal section 12-43.3-401 (1)(d), C.R.S., authorizing medical business operator registrations.

Mr. Kammerzell continued, saying we believe that the rules are consistent with the Colorado statutes as well as case law. The medical code expressly provides the issuance of an operator registration, in other words the state licensing authority has not created a licensing class not provided for in statute. The state licensing authority did not act arbitrarily or capriciously. The state licensing authority position is grounded in statute. The rule-making process complied with the Administrative Procedures Act and promoted reasonable policy objectives for the MED and the DOR. The state licensing authority's rules regarding medical business operator registrations provide a clear framework for

issuing, renewing, and revoking the registrations and the registration rules promote important policy goals. Again responding to a legitimate industry need as reflected by the General Assembly's creation of the retail business operator license by reducing the licensing and application burdens on medical business operators resulting from the ownership approach; improving transparency and understanding regarding the role of medical business operators; avoiding industry disruption for licensees who have medical businesses and medical establishments and wish to higher an operator; and finally to closing enforcement gaps that result if only the employees of the medical marijuana businesses were vetted and approved by the state licensing authority. In conclusion, medical marijuana business operator registration is not a new business license class, rather it's a registration and the medical code expressly provides for such registrations and it does not limit registrations to individuals. The state licensing authority's decision to create the medical business operator registration is a reasonable and lawful exercise of statutory authority and discretion and the Committee should not disapprove the medical business operator registration rules, we respectfully request. Again, the biggest concern that we have is creating this hardship on the marijuana industry in terms of not being able to have both the ability on the medical side and the retail side to have a functioning operator, particularly for co-located licensed premises.

Ms. Brett-Goldin said I have just a few things. I wanted to get a little more technically into the law. It's our view that the sunset bill made this license class mandatory; something that the state licensing authority had to issue. The sunset process looked at the prior structure where a management company was given ownership status and decided that wasn't workable. It's also no longer workable on the medical side because S.B. 16-040 radically changed the ownership structure for marijuana businesses and the prior structure wouldn't work in the context, so this rule also provides some continuity for the industry. What's important to note is that what the state licensing authority did here was activate a statutory authority that already existed to create a registration and the work occupation can be read to modify license but not registration. There's nothing in the statute that would limit the registration to an individual. The state licensing authority has always exercised discretion with how to implement sections 12-43.3-401 and 12-43.4-401, C.R.S., of the codes. For example, there are various different kinds of occupational licenses given associated key support and those are all a legitimate exercise of discretion. The *Prouty* case that Mr. Dohr cited is not on point. That is a situation where there was a broad engineering license that through rule was narrowed to be restricted. This is simply activating an already existing statutory authority. I would note that the medical code had far broader rule-making discretion than even the retail marijuana code. I do understand and appreciate what Mr. Dohr has identified and the concern he raised, but we think this is very firmly grounded in statute.

But I want to echo what Mr. Kammerzell said, that Mr. Dohr was truly a pleasure to work with and we really appreciate his professionalism, but at the end of the day where there is statutory authority we would argue that this Committee and the General Assembly and the courts should defer to the broad rule-making authority that's been granted to the state licensing authority.

Representative Foote said I have a question I wanted to throw out there, particularly for Mr. Kammerzell, because those of us that sat through these hearings on either House or Senate Finance last year will probably recall a lot of discussion about trying to harmonize the retail and medical marijuana regimes as much as possible and I guess I'm wondering if this rule was an effort to do that? Mr. Kammerzell said that's a really good question and indeed it was. I mean short of having the statutory authority granted by the General Assembly to grant a license, we felt that a registration on the medical side was the best way to reach that or seek that harmonization between the two so that we didn't have a medical side that was disadvantaged by not having the ability to have the same process or a similar process by which they could have an operator come in and manage their business for them. Representative Foote said are there any differences between a medical marijuana registration and a retail license? Mr. Kammerzell said the way that the statutes and the rules are written we believe that we have still the same authority and control over the registration and were able to give them similar authority of a licensee on the retail side to be able to effect and do the business of an operator. We hold them to similar standards in terms of the ability to seek and take disciplinary action should they fall outside of the rule requirements or following the rule requirements or the statutory requirements so they are very, very similar. We also structured the application process and the vetting process to be very similar to the retail operator license.

Representative Dore said are there other examples where DORA or a regulatory agency has used the registration of a business outside of the marijuana area to promulgate? Ms. Brett Goldin said I would guess there have been, but nothing's coming to mind instantly.

Senator Steadman said to the questions, I am familiar with some regulatory schemes at DORA where it is registration and not licensure that is the regulatory device. By registering you're just giving your information to DORA. By becoming licensed you're passing some sort of bar, you're taking a test, you're meeting some sort of qualifications, and so there's a difference in terms of what that means to consumers who are encountering these people. Someone who is licensed, we've done some looking into them, some checking them out, versus with registration we can just tell you where to find them. But there are professions that in order to practice the profession it requires a registration. That is something that happens. My question for the DOR and actually this is going

to surprise you after I've been sitting here this morning shooting down DOR arguments, I'm inclined to want to go with your view of the medical marijuana code and in particular section 12-43.3-401 (1)(d), C.R.S., where it does talk about license or registration of owners, managers, operators, employees, contractors, and all these people that come in and it seems like you have that authority to create, and my question is where it talked about both licensing and registering does your rule on the medical side only register these people or is it called a license? Mr. Kammerzell said in the rule it does refer to it as a registration, however, in full disclosure our intent was to have it exactly mirror the retail operator regulations and in so doing we have parts where it says registration and parts where it says license so we have what we believe is a scrivener's amendment that needs to be done to correct any reference to a license and change it to registration. Our intent was to make it a registration. Senator Steadman said in my mind you have the authority to create an occupational license for operators so I was just curious are you playing that game with semantics when the requirements to become a registered medical operator or a licensed retail operator are otherwise the same. Is that correct? Ms. Brett-Goldin said the intent in part was because traditionally an occupational license just within the MED has been to an individual and so the registration was to distinguish that and have that be to what is issued to a business under subsection (1)(d). Most of the rules, or a good portion of the rules, use the word registration correctly, but there was an error as Mr. Kammerzell pointed out and which Mr. Dohr caught and we certainly want to fix that error. The other point I wanted to make is that the medical marijuana code specifically says in section 12-43.3-201 (1)(a), C.R.S., as well as section 12-43.3-401 (1)(d), C.R.S., that the state licensing authority may take any action with regard to a registration as it may with regard to a license. It's not an issue of semantic games, but just keeping separation between what types of licenses are given versus registrations.

Representative Dore said I'm just thinking here, corporations, businesses, and persons when it comes to law aren't distinguished in many cases. Has that ever been the precedent that DORA or other organizations have used that if the statute refers to a person, because the law often cites the corporation as having individual rights as well, to use it in the rule-making procedure?

Representative Foote said is that regarding the second part of the memo and analysis?

Representative Dore said more so I guess, are we going to do that separately?

Representative Foote said if we could, it might keep it a little straighter.

Senator Steadman said I think that Representative Dore's question is to this first analysis because the way subsection (1)(d) reads. It talks about an occupational license or registration and I guess the question is to have an occupation do you have to be a natural person or can that be some other form of business entity? Mr. Kammerzell said the only analogy I can refer to is in the past we have had a registration for couriers that actually deliver marijuana products on behalf of a licensed business and those are often times businesses. Now with the transporter license those were supplanted because they were no longer necessary but we have had instances where we actually registered a business entity in the past.

Representative Foote said I'm sorry Representative Dore if I misinterpreted your question. I don't know if that's what you were getting at or not.

Representative Dore said I'm probably getting at more of what we're going to talk about in a minute but these sort of bleed together in some ways so I think it was appropriate.

Mr. Kammerzell said with respect to that I'll just give you a very broad overview of the second part. Sections 12-43.4-104 and 12-43.4-103, C.R.S., of the retail marijuana code define a direct beneficial business owner as a person or closely held business entity including the officers, directors, managing members, or partner of the licensed marijuana business itself or the closely held business entity. In our Rules M 103 and R 103 we defined direct beneficial interest owner as a natural person or closely held business entity. Sections 12-43.3-104 and 12-43.4-103, C.R.S., define person, unless the context otherwise requires, to mean a natural person, partnership, association, company, corporation, limited liability company, or organization or a manager, agent, owner, director, servant, officer, or employee thereof. Any entity with the statutory term person partnership, association, company, corporation, limited liability company, or organization may be a direct beneficial interest owner so long as it is closely held. The closely held requirement is necessary to comply with other provisions that are provided for in the statute including the statutory definition itself. Any entity included in the definition of person may be closely held, the only limitation is that the entity have no more than 15 shareholders, officers, members, or partners, each of whom are natural persons, each of whom holds an associated key license, and each of whom is a United States citizen prior to the day of the application. When we were working through S.B. 16-040 I was very actively involved in that process and one of the concerns was that we certainly wanted to have the ability for our licensees to go out and attract outside investment, capital from outside of the state of Colorado, because up to that point you had to be a resident of Colorado to be an owner in the company. However, at the same time both the industry and the MED recognized that it was probably prudent to put some kind of governors on that so that we weren't

inundated with these complex ownership interests from abroad that were going to be difficult for us to investigate and difficult for us to verify funds invested into our licensed businesses in the state of Colorado so that governor was placed on it to cap it at 15 people. Under our rules the entity included within the definition of a person may be a closely held business entity. In Rules M 201 and R 201, it specifies the application requirements if the closely held business entity is a corporation or a limited liability company or partnership. The rules avoid us from having superfluous language. The statute in our mind is ambiguous because person already includes any closely held business entity. The context requires that the term person or closely held business entity be interpreted to be natural person or any entity that is closely held otherwise the use of the term closely held business entity as it is used in the statute has no meaning and is superfluous. We believe that the rules themselves effectuate the statutory definition. The statutory definition of a direct beneficial interest owner in sections 12-43.3-104 (1) and 12-43.4-103 (1), C.R.S., states that the officers, directors, and managing members or partners of the licensed business itself must themselves be direct beneficial interest owners and that the officers, directors, managing members, or partners of the closely held business entity must themselves be direct beneficial interest owners. It includes no such requirement for entities that are not closely held. The Office's interpretation permitting nonclosely held business entities to be direct beneficial interest owners would thwart the required vetting of officers, directors, managing members, and partners of a direct beneficial interest owner. We believe that the rules effectuate the other portions of the statutory scheme, specifically defining the term direct beneficial interest owner to include only natural persons and those entities that are closely held is consistent with the other provisions contained within the statute in S.B. 16-040. By contrast, inclusion of entities that are not closely held would allow ownership structures that are manipulated so as to avoid other provisions in the statutes such as limitations of the 15 direct beneficial interest owners when any of the direct beneficial interest owners are an out of state resident, requirements that closely held business entities be comprised entirely of natural persons, and the requirement that all natural persons that are direct beneficial interest owners be United States citizens. In conclusion, the rule definition of direct beneficial interest owner is a reasonable exercise of state licensing authority's broad rule-making authority and is consistent with the statutes. The rules resolve a statutory ambiguity, avoid rendering the term closely held business entity superfluous, effectuate the statutory definition as a whole, and effectuate the statutory scheme as a whole.

Ms. Brett-Goldin said I could maybe add just a couple of brief points. One way to look at this is to look at the term person or closely held business and natural person or closely held business and then look at the definition of person that includes natural person and several different types of corporate entities. And as

Representative Dore correctly stated person does include business not just natural persons. But what this rule does and what we think the statute does is overlay those entities with the requirements simply that they be closely held and that fact is reflected in some other rules, one of which Mr. Kammerzell mentioned, which are Rules M 201 and R 201 on applying for a license. What it specifies is specific types of application requirements for a closely held business entity that's a corporation, for a closely held business entity that's a limited liability corporation, and for a closely held business entity that's one of a variety of types of partnerships. This means that the rules do contemplate that any of these types of entities that are listed in the definition of person can be a direct beneficial interest owner as long as they are closely held.

Senator Scott said I was curious sitting here thinking about this as whether we as Committee members should consider laying this over until a meeting after the new administration on the federal side takes effect. The reason for that is I think it's been pretty clear there's a very high potential that marijuana may be considered illegal in the states that have approved it and therefore we would be looking at this completely differently in say February, for example, then we are today. But I thought that might be a suggestion versus just keeping the rules in place the way they are and seeing what happens at the federal level because things have changed and I think we all know that. It's been pretty clear I think from the Attorney General-elect what he may do. I'll just throw that out there for consideration and we may take a look at laying this over.

Senator Steadman said I would resist that suggestion. It's sort of like saying let's not do anything in rules around the banking issue because Congress will fix the problem. I don't believe that and I don't think we should wait for action or inaction from Washington. We've been doing what we've been doing in disregard of federal law with the entire subject of marijuana; we're pretty far down the road in disregarding federal law and creating all of this, and as much as there is some speculation that an ill wind will blow from the east, I'll believe it when I see it. In the meantime, we've got this issue and I can say that I was tangentially involved in the work that went on this year around S.B. 16-040 and was the one that moved the amendments that put in place this scheme that became the final version of the bill. What the DOR is arguing in how they would like us to interpret the statutory scheme and the rules they've meant to give it effect I think is correct. There was a great deal of concern about types of business entities that may become part owners in marijuana businesses here and the amount of effort it would take on the DOR's part to go through the licensing requirements for foreign entities and out-of-state entities that may have complex business arrangements. There was a lot of discussion about limiting those people who could become investors in marijuana businesses to natural persons or closely held entities and that really was the basic scheme of S.B.

16-040 and to now say the word person or closely held business entity means person, the entire spectrum of business entities, or a closely held business entity really would negate the entire statutory scheme and the limitations that were put in place. I do think what the DOR has done in rulemaking and the interpretation that they brought to us is consistent with the intent of the legislature in crafting S.B. 16-040 the way we did and that the word person in the statute probably should have drawn more scrutiny and is now the thing that's making us dance on the dead of a pin right now, but I think the dance steps you've come up with have been designed to give effect to the legislative intent and the statutory scheme as a whole and so I would be prepared to extend the rule.

Senator Scott said thank you Senator Steadman for your clarification and to your point, we are in violation of federal law and we don't know at this point what we don't know and that's what makes it difficult to make decisions based on that if in fact somebody decides to enforce federal law. Again I would just suggest that we take a look at laying this over until our meeting in February or we know what the new federal laws may look like or if they don't change anything then we could proceed.

Representative Foote said I guess I'll give my reaction to what you're saying. I appreciate you bringing it forward because obviously since recreational marijuana passed in 2012 we've been operating in an environment of uncertainty, not sure how the federal government's going to respond or not respond. I feel like we're still there. There could be change on the horizon, but nothing really has changed about the uncertainty it seems to me. It also seems to me our charge as the Committee is to look at the proposed rule or the rule that has been passed that we may or may not extend and determine whether or not it fits under the current statutory authority. I don't really think that what the federal government does or doesn't do between now and February really matters to that. I think what matters is our interpretation as to whether or not the rule that's been promulgated is actually something that fits under our current statutory authority for the state of Colorado. In that regard I would ask the question just for clarification in my own mind about your argument, and Senator Steadman touched on this but I just want to clarify, which is I take your argument as saying the definition of person under direct beneficial interest owner, and I'm looking at page 7 of the Office's memo, means a natural person or a closely held business entity and so I think what you're saying is when you take a look at the definition of person under section 12-43.4-103 (13), C.R.S., it says a natural person, partnership, association, company, corporation, llc, etc. I think what you're saying is as long as all those things under the definition of person are closely held business entities then it would be classified correctly as a

direct beneficial interest owner, is that correct? Ms. Brett-Goldin said that's correct.

Representative Kagan said I'm trying to understand Senator Steadman's point. He said that the rules as promulgated and passed and approved by the DOR reflect the intent behind S.B. 16-040. Do you think that they also are statutorily authorized because it seems to me our question isn't whether they reflect the legislative intent, but whether they actually have statutory authority?

Senator Steadman said I think the answer is yes. I think what they've done by rule is say that a direct beneficial interest owner could be a natural person of some variety or a closely held business entity and that was what the statute intended and in fact says. The statute says a little more than that, it says person or closely held entity, and the rule does further narrow down the person to just the natural persons because otherwise to have person include the full statutory definition of the full spectrum of business entities and therefore the requirement to be a direct beneficial interest owner is to either be a closely held business or any old business totally undermines the entire point of the work the legislature did with SB 16-040 to narrow in on permissible direct beneficial interest owners. I agree there's a slight problem in that the word person was used in the statute and it is a defined term with a very broad meaning, but clearly the context in which it was used intended a restriction on it. Only business entities that were closely held or individual persons could become these owners because of the requirements we're going to put you through to be approved as an owner.

Mr. Dohr said I just wanted to respond to a few of the points that have been raised regarding both of the issues. First, I agree with Mr. Kammerzell that this is really just a professional disagreement. We've had a lot of great conversations over the last month regarding these issues and I also don't disagree with the assertions that they've made on both sides regarding the policy that's related to the decisions that they've made, but ultimately this isn't a question of what's the right policy, it's a question of authority. I think on the first issue you have this issue of registration and licensure and they've been using those terms interchangeably, but they have treated the registration for medical marijuana business operators the same as the retail marijuana business licenses so whether they call it a license or a registration they're treating it the same way. It is a business license, not an individual registration or an occupational registration. I think the other thing that's important related to that issue too is that what you're going to be deciding today is precedent and so if you decide today that the medical marijuana business operator license is okay then in the future any other business entity that wants to have licensure in the marijuana business world could just go to the MED and ask for that license as opposed to coming to the General Assembly. If you are interested in retaining your plenary authority

which I think is there under the *Prouty* decision it is important not to extend the rules related to medical marijuana business operators. Secondly, on the direct beneficial interest owner issue, I'm not going to quibble with what the legislative intent was, but I again think there's a mistake in the statute and so the better course is to not extend the rule and fix the statute because if not you'll then have a situation where you have a conflict in the definition in statute and in rule. I think from our Office's position, and I think that the Committee has generally agreed with us, that it's really important that the definitions between statute and rule be the same so that those folks who are trying to figure out what they're supposed to do and are acting in accordance with the law and maybe don't have the ability to engage legal counsel can actually figure it out. If they are in a position where the statute says one thing and the rule says another thing that makes it really difficult for the citizen who's trying to do the right thing to actually know what the right thing is. I think that's another consideration in terms of not extending the definition of direct beneficial interest owner in both the medical and retail codes.

Representative Foote said I understand exactly what you're getting at as far as license and registration being effectively the same thing and how that could affect our authority, particularly under *Prouty*. I guess what I'm wondering on the other side though is if there is anything that you know of that limits the DOR's ability to do certain things under the rubric of registration? Mr. Dohr said again I think that's a question that is hard to answer without actually looking at specific language because one of the things that I pointed to is the actual language of the rule that requires that these medical marijuana business operators maintain a separate place of business so that they're not just basically somebody who just goes to the same place every day and works there, that they have their own separate business and part of that business is going out to the other places that they operate and effectuating the operations there. I think that by the terms of the rule itself those are business licenses and so again you can call that a registration or a license, but ultimately it's really the way that you're treating it. I think there is a difference between an occupational license or registration and the business licenses and if you look at page 4 of the memo you have the two sections 12-43.3-401 and 12-43.4-401, C.R.S., side by side and you can see that basically in that list you have all the business licenses in their own separate paragraph and then the occupational licenses and registrations are all lumped together in one. That's the way that it's always worked before, that those are the individual licenses, those are the people that work there, and that in my mind is a very big distinction in terms of the plenary authority of the General Assembly compared to the rule-making authority of the MED.

11:11 a.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend Rules M 1700 through M 1704 and the definition of "medical marijuana business operator" in Rule M 103 of the Marijuana Enforcement Division and asked for no vote. The motion was not seconded and died due to lack of a second.

11:12 a.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend the definition of "direct beneficial interest owner" in Rules M 103 and R 103 of the Marijuana Enforcement Division and asked for a no vote. The motion was not seconded and died due to lack of a second.

Representative Foote said we have a substitute presenter for item number 2 on the agenda. Mr. Sweetman is not here, but Mr. Dohr will be able to give us an update.

11:14 a.m. – Mike Dohr addressed agenda item 2 – Update on request of the Committee to review out-of-cycle rules of the department of human services relating to fraud penalties that were similar to the fraud rule on LEAP that the Committee voted not to extend at the November 17 meeting.

Mr. Dohr said at the last meeting the Committee voted not to extend rules of the low-income energy assistance program (LEAP) because the disqualification penalty conflicted with the statutory penalties. During the discussion of that rule, the Attorney General's office had pointed out to our Office that there had been other similar penalty structures in rule and had sort of suggested that the fact that those rules had been approved by our Office then meant that the rule at issue with LEAP should also be approved. At that point and time those rules were not formally before the Committee, but before the adjournment of the Committee last time Senator Steadman did ask that the Office review those rules for a determination as to whether they fit within the statutory authority. Mr. Sweetman of our Office did do that review and consulted with the Attorney General's office related to those specific programs and the Attorney General's office actually provided specific statutory authority for the penalty schemes for both of those rules so we believe those rules both do have the sufficient statutory authority. Therefore, we're not going to be making any recommendations regarding those rules at this point and time.

Senator Steadman said thank you for looking into that. I appreciate the update.

11:18 a.m. – Debbie Haskins addressed agenda item 3 – Committee Bills and Sponsorship of Committee Bills.

Ms. Haskins said we did just pass out the draft of the Rule Review Bill which is based upon the Committee's votes at the last meeting on rules issues. What we will need to do is redraft the bill to include the votes that the Committee just took today and incorporate that into the Rule Review Bill. I would like the Committee to approve the draft of the Rule Review Bill giving me permission to include the votes on the rules that you voted not to extend in the draft of the bill. I would like a motion on approving the draft for introduction with those changes.

11:20 a.m.

Hearing no further discussion or testimony, Senator Johnston moved the approval of the Rule Review Bill as introduced with permission for Ms. Haskins to add the rules that were not extended at today's meeting. Representative Foote seconded the motion. No objections were raised to that motion and it passed unanimously.

Ms. Haskins said the interesting thing is what to do about sponsorship of this bill and some of the other bills because we do not know who most of the House members of the Committee are going to be next session. The House appointments have not been made. You have a lot of turnover on the Committee for next session. I'm not sure what you want to do about selecting bill sponsors for the Rule Review Bill. We could wait until you have your organizational meeting in January to select the sponsors for the Rule Review Bill.

Representative Kagan said you say the House Committee members haven't been appointed, but the Senate Committee members haven't been chosen either, have they? Ms. Haskins said the appointees for the Committee for the Senate have been made. We do know that and Senator-elect Gardner is the Senate Judiciary Chair, and Judiciary chairs are automatically on the Committee, Senator Holbert, Senator Cooke, Senator Guzman, and Senator-elect Kagan have also been announced as the appointees of the Committee to be reconstituted in January. The House Judiciary Chair is Representative Lee so he will be on the Committee, but we haven't heard of any other House appointees for the Committee. We're kind of in a little bit of a quandary in terms of these bills that we're going to be talking about in terms of sponsorship. I don't know what you want to do about that.

Representative Foote said I have requested to remain on the Committee so of course that is up to the Speaker and ultimately it ends up being approved through a resolution, but I'm not aware of others who have requested that at this point. Obviously Representative Lee will be on the Committee and if approved I will be on the Committee. I'm happy to move forward and volunteer to be a sponsor on at least a couple of these bills from the House. I'm assuming we'll be able to find Senate sponsors as well if we're able to do that. We could just go forward with having those sponsors on the bill if you think that would work. Ms. Haskins said I think so. What's the decision on the Rule Review Bill then for sponsorship? Representative Foote said do we have a Senate sponsor volunteer? Why don't we table this and we can come back to in once some members have come back into the room. Ms. Haskins said there are other bills that the Committee needs to discuss about sponsorship. Two of them are the Revisor's Bill and the Bill to Enact the C.R.S.

11:22 a.m. – Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, testified before the Committee. She said I'm here to talk with you about two bills. But ever so briefly on the Revisor's Bill, you're all familiar with that, it's an annual bill, and I think what I'll plan to do is bring it to the Committee at your first meeting in January when you're fully constituted with the new members because that bill is introduced late in the session. I aim for April Fool's Day, that's my target date always. We are working on the bill, but there's no need for you to have to worry about it now and I will bring that back to the Committee in January. However, the other bill that I think is more urgent is the Bill to Enact the C.R.S. Again this is an annual bill, but this bill is the one that's introduced very early in the session, within the first week, and it's typically one of the first bills delivered to the Governor for action if it's enacted by the General Assembly. Basically it's a technical, nonsubstantive bill that once enacted makes the soft-bound volumes of the Colorado Revised Statutes the positive and statutory law of a general and permanent nature of the state of Colorado. Essentially what it does is codify all of the revision changes that we have made as well as all of the bills you all enacted over the course of the last session that were approved by the Governor. In addition, it will also include the changes made by voter approval of propositions 106, 107, and 108. Parenthetically I would just mention I just found out this morning that your special supplement will ship from LexisNexis on Wednesday, so you should be getting it before the end of the month or the beginning of next month. Once the Bill to Enact is signed and becomes law, the text of the C.R.S. becomes legal evidence of the law in a court of law rather than just prima facie evidence of the law. It's actually a really important bill even though it's a very small bill and one that's easy to overlook. That's why I would encourage you to consider it now and give us authority to go ahead and prepare it and select your bill sponsors for it too to get it introduced early in the session.

Representative Foote said so we've already approved this bill, we just need to get sponsors at this point? Ms. Gilroy said that would be great, yes, thank you. Representative Foote said Senator Scott I think this would be the perfect bill for you. Senator Scott agreed to be the Senate sponsor. Representative Foote volunteered to be the House sponsor on the bill.

Ms. Gilroy said one other thing about the three propositions. Propositions 107 and 108 kind of touched on each other. There was a little bit of a quandary on publication of the measures that were approved by the voters last month. You may or may not recall there was an elections bill last session, S.B. 16-142, that actually amended sections of the law that are also impacted by Propositions 107 and 108. After much consideration and discussion we've decided how to publish them and I have actually had a conversation with Troy Bratton at the Secretary of State's office and he was going to work with Ms. Suzanne Staiert, Deputy Secretary of State, to advise her about our choice on how to publish them. I just wanted to give you a heads up that in order to give effect to the voter's approval of propositions 107 and 108 we had to do some harmonization and make some changes to the law and undo some things that were actually done by S.B. 16-142. I didn't want that to be a surprise to the Committee and if you want further information about that I'm happy to provide that at a later date.

Representative Foote said Senator-elect Kagan, we were talking about the Rule Review Bill and about potential sponsors and while you were out of the room it was strongly suggested that you would be the Senate sponsor on the Rule Review Bill. Representative Kagan agreed to be the Senate sponsor of the Rule Review Bill and Representative Foot agreed to be the House sponsor.

11:28 a.m. – Thomas Morris, Managing Senior Attorney, Office of Legislative Legal Services, testified before the Committee. He said you may remember this bill is an outgrowth of the Title 12 Recodification Study and the bill that authorized that study directed our Office to look into ways to minimize the fiscal impact of a recodification effort and this was the stern consensus that arose out of our stakeholder process. We presented this bill at your last meeting and at that time you asked for the two changes that show up on page 2 of the bill, there are now the words relocates and relocated. It used to say amended. This is slightly more specific a limitation on when an agency does not need to use the full rule-making procedure in order to renumber a reference to a statute when the legislature relocates that statute and thereby makes the rule inaccurate. Rather than having to incur the fiscal impact of a full Administrative Procedure Act rule-making hearing, notice, comment, and all of that, they can simply tell the Secretary of State to renumber the citation of the statute in the rule. The goal on this and the thought was to get this bill enacted early in the session so that the other 13 or 14 bills that the Committee has approved in concept would

have this in law already when it came time to do the fiscal analysis of those other bills.

11:29 a.m.

Hearing no further discussion or testimony, Representative Kagan moved that the redraft of LLS 17-0223 be approved. Senator Steadman seconded the motion. No objections were raised to that motion and it passed unanimously.

Representative Kagan agreed to be the Senate sponsor and Representative Foote agreed to be the House sponsor. The scrivener's error bill will start in the House.

11:31 a.m. – Debbie Haskins and Dan Cartin, Director, Office of Legislative Legal Services, addressed agenda item 4 – Consideration of Adoption of a Revised Retention of Records Policy for Legislative Member Files.

Ms. Haskins said I am really hoping that the third time is the charm here because this is the third presentation this fall that I have made to you about the members file issue. You actually have been discussing this since November 5, 2015. I think the Committee is pretty well aware of what the issues are with the member files, but at the last meeting there were some questions that the Committee had about the member files and the proposed retention of records policy and so we have the questions and answers to those to bring back to you. We're back to revisit that and ask the Committee to approve a new policy regarding the retention of records and to recommend that the Executive Committee make changes to the retention of records policy that governs how our Office maintains member files and other records. At the last meeting there were questions about whether the fact that a legislator had previously signed a work product waiver form for his or her member file and thereby made the file subject to public inspection generally prevented the destruction of that file pursuant to the revised retention of records policy. Our answer to that question is no. Although a member has previously signed a work product waiver form and thereby made his or her member file open to public inspection, neither the Colorado open records law or any other relevant provisions precludes the ability of the General Assembly to subsequently create and apply a record retention policy that provides for the maintenance and destruction of that file. We believe that it's fine for the Committee to adopt a revised retention of records policy as proposed. The second question had to do with the attorney-client relationship that our Office has with members and does that create a duty to notify a member prior to destroying his or her member file similar to the notification prior to destroying a client file in private practice. The answer to that question is no. The Office maintains an attorney-client relationship with the General Assembly as an institution. It's our position that we do not have an

attorney-client relationship with the 100 individual members. We have handed out the position statement of our Office on the attorney-client relationship. Even if the member was a client of the Office, the member file compiled and maintained by the Office is distinguishable from a client file contemplated under the Colorado rules of professional conduct. We believe that it is fine for the Office to destroy the records. The third question is does the fact that the Office has an attorney-client relationship with the General Assembly as an institutional client impact its ability to destroy member files or otherwise require some type of pre-destruction notification to members as constituents of the organization and our answer to that is no with the same analysis that we gave to answer 2. And the fourth question is was giving prior notification to legislators about member files and the eight-year retention period prior to the destruction thereof in accordance with the policy feasible and appropriate in furtherance of the policy and our answer to that is yes. We do think that we could do that. We don't think that prior notification of or consent to destroy a member files is required, but it could be definitely a best practice to really be clear with the legislators what the policy is. That answers the questions that mostly were raised by Representative Willett and I can tell you that Mr. Cartin and I had a conversation with Representative Willett on Friday and he was satisfied with the answers. We hope that that addresses those concerns of the Committee. We are really recommending that the Committee move this forward to the Executive Committee and do that via a letter. We have had some conversations with State Archives about some concerns that they had initially about destroying the records. When we sat down and talked with them, it was because they thought that the records contained post-introduction materials, which they do not. They also didn't realize who created the records, that it was created by the staff, and they thought that these were legislator-created files, which they are not. State Archives agrees with us that these do not have much historical value and that the two offices have a mutual interest in not storing records over at State Archives that no one can ever access since they are privileged work product. We have been discussing with them working out a schedule to destroy the records as outlined in our memo by shredding them. We have found out the amount of records that are currently over at State Archives and it is 1,100 cubic feet. So what we worked out with State Archives is that if this goes forward and Executive Committee does adopt the policy as proposed we would be looking at shredding the records next summer in the interim. We have looked at the cost of doing that and it's somewhere between $5,600 and $7,700 and that cost would be borne by the Office not State Archives. There is a cost to shred. Part of the recommendation is that for the files that are down in the subbasement (we have eight years' worth of space down there) once the files in the basement hit that eighth year that they would be shredded. The cost to do that annually would be about $180 and that can definitely be absorbed by the Office's resources. Again we're asking the Committee today to recommend to the Executive Committee

that it adopt revisions to the retention of records policy as we've outlined in Addendum F and Addendum G. Addendum F shows you the changes to the policy and Addendum G is the final version. The changes do reflect what we've been discussing with the Committee as well as updating some of the retention of records policy that related to other records besides the member files, which are just out of date with technology; we're talking about microfiche and things like that which we don't do any longer. Again we think that this could be handled by a Committee motion to draft a letter to the Executive Committee recommending these changes.

Mr. Cartin said I would echo Ms. Haskins' comments and her request of the Committee. We thank the Committee for its questions, the time it has spent, and the learning curve on this issue over the past year. We think that we have a good solution and a good updated policy and so we respectfully request and perhaps even encourage that the Committee move this on to the Executive Committee.

11:40 a.m.

Hearing no further discussion or testimony, Representative Dore moved that the Committee recommend, as per the Office of Legislative Legal Services, a letter to go to the Executive Committee with the Committee's recommendation that they take up the proposed retention of records policy. Senator Roberts seconded the motion. No objections were raised to that motion and it passed unanimously.

Mr. Cartin said if I could I'd like to take a minute to extend our thanks to the members of the Committee who are departing the General Assembly. On behalf of Ms. Haskins and the entire Office I'd like to thank those of you who have served on the Committee. Representative Dore has served for two busy years since his appointment in 2015. Senator Steadman has been a member of the Committee since his appointment in October of 2013 and served as vice-chair in 2014. Senator Roberts was appointed as then Representative Roberts in 2007 and has served for 10 years on the Committee and if that's not the record it's got to be close. We also want to acknowledge in absentia Representative McCann, Senator Scheffel, and Senator Johnston who is here today. On behalf of the entire staff of the Office I would like to recognize and thank each of you for your service on the Committee and to our Office. We greatly appreciate the commitment you made to the Committee's role and work. It speaks to your recognition of the Committee's significance to the institution and to the legislative branch. We're also grateful to each of you for the support you have given to matters involving our Office during your time as our oversight committee. I will also say it's been a pleasure for our entire staff to work with each of you outside of this Committee on your bills. I also would like to note

Senator Scott who has also served on the Committee since 2016. He will be here next session but won't be returning to the Committee. Thank you again. We've really had a terrific group the past two years. It's been a privilege working with you and we will miss you and we wish you well in your future endeavors; thank you Committee.

Representative Foote said I'd like to second that. The members of this Committee and particularly Senator Steadman, Senator Roberts, Representative Dore, and I mean really everyone in my opinion, are some of the best legislators that we have here I think. It's been a pleasure serving with all of you. I came in four years ago and I think I just very quickly looked towards you as effective legislators who represent your constituents and the state very well, are intelligent, ask good questions, and are always prepared and really the model of what a legislator should be. I've taken that to heart and tried to imitate it as much as I can. I'm sure that I fall short most of the time, but the effort is there and I just wanted to say that as well. And to staff I really appreciate you bringing that up. And that goes for Senator Johnston and Senator Scheffel and those that aren't here as well including Representative McCann. It's really a pleasure to serve on this Committee because we have close interaction and really analyze things differently than we do in our other assignments and I do appreciate that and I appreciate you all.

11:45 a.m. – Debbie Haskins addressed agenda item 5 – Scheduled Meetings During Session.

Ms. Haskins said just a reminder that we will have to figure out when we will have our organizational meeting in January and do orientation for the new members. We'll be contacting the returning members and newly appointed members about that. Our plan is to continue meeting on the first Friday of the month during session once February starts.

11:46 p.m.

The Committee adjourned.